NO. 22153
22153-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

BRIEF OF APPELLEE, KYLE Z. GRAINGER, JR., REORGANIZATION TRUSTEE

Appeal from the United States District Court

for the Central District of California

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GENDEL, RASKOFF, SHAPIRO & QUITTNER

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I

STATEMENT OF JURISDICTION

Inasmuch as no jurisdictional statement was made by Appellants as required by Rule 18 of this Court, the following is a brief statement of the pleadings and facts disclosing jurisdiction.

The proceedings herein were commenced by the filing of a voluntary petition for reorganization under the provisions of Chapter X of the Bankruptcy Act (U.S C Title 11, Chapter 10, §§501-676) on January 31, 1964 by the Debtor Corporations, Human Relations Research Foundation, a Washington corporation, and its subsidiaries, Educational Corporation of America, a California corporation, Universal Mortgage Corporation, a California corporation, Trans-America Property Corporation, an Oregon corporation, and La Pine Acres, Inc., an Oregon corporation. On the same date, an Order was entered appointing Kyle Z. Grainger, Jr., the Reorganization Trustee, and an Order of Reference was made to the Referee in Bankruptcy and Special Master.

Jurisdiction of the District Court is based upon the provisions of Bankruptcy Act §111 (11 U S C. §511) which provides that the Court in which a Petition is filed shall have exclusive jurisdiction of the debtor and its property, wherever located. The instant proceeding concerns Orders effecting a sale of the property of the debtor. Jurisdiction of the Court of Appeals is based upon Bankruptcy Act §121 (11 U.S.C.

§521) which provides that jurisdiction of the Appellate Courts in Chapter X matters shall be the same as in a bankruptcy proceeding.

Bankruptcy Act §24 (11 U.S.C. §47) provides for appellate jurisdiction in the United States Court of Appeals in proceedings in bankruptcy and in controversies arising in proceedings in bankruptcy. The Orders under appeal herein all arise in proceedings in bankruptcy within the meaning of Bankruptcy Act §24 and, accordingly, jurisdiction was properly vested in the United States District Court and appellate jurisdiction is vested in this Court of Appeals.

II

STATEMENT OF THE CASE

The sole legal issue involved in this appeal is whether or not the District Court abused its discretion in authorizing the Reorganization Trustee to terminate an earlier sale for failure of an express condition and in authorizing a subsequent sale for a substantially better price and free of burdensome conditions. Although the legal issue is a simple one, it has arisen out of a voluminous exchange of documents and pleadings, as is evident from the size of the Clerk's transcript of record on appeal, but this introductory statement is restricted to the events immediately pertinent to the issues on appeal.

By way of a partial compromise of fraudulent conveyance actions filed by the Reorganization Trustee against the University of America Foundation and two principals of the Debtor Corporations (Charles Simmons and Charles Simmons II), the University of America Foundation quitclaimed the property at 929 South Hope Street to the Reorganization Trustee In accordance with an Order entered by the Reorganization Court on December 22, 1966, the Trustee offered the real property for sale in the Courtroom of the Special Master and Referee in Bankruptcy on January 11, 1967. Notice to creditors, to the debtors and to John N. Frolich, in his capacity as attorney for Charles Simmons, Charles Simmons II, and the University of America Foundation, was given in accordance with the

Court's Order of December 22, 1966. No acceptable offer was made for the property at the hearing on January 11, 1967 and, accordingly, the Court continued the matter to January 19, 1967 to hear further offers. Inasmuch as the property was subject to encumbrances and tax liens of approximately $255,000, the Reorganization Trustee fixed $275,000 as the minimum price he would recommend to the Court. At the hearing of January 19, 1967, the Appellants made an offer of $275,000 for the real property and certain personal property. An Order approving the sale to Appellants was entered February 14, 1967 [Cl.Tr. 18]. Escrow Instructions dated February 3, 1967 were attached to and incorporated into the Order Approving Sale. These Escrow Instructions were never signed and were subsequently superseded by signed Escrow Instructions dated February 10, 1967 [Cl.Tr. 33]. [See Appendix 1 hereto].

While the fraudulent conveyance actions of the Reorganization Trustee against the University of America Foundation for recapture of the Hope Street property were pending, but prior to the delivery of the quitclaim deed in compromise, the University of America Foundation entered into a parking lot lease with Charter Auto Parks covering approximately the North half of the property. Because Appellants desired to operate the entire property as a parking lot and required possession of the entire premises upon close of escrow, John N. Frolich, in his dual capacity as attorney for the buyers, and as attorney for the University of America Foundation, and

its president, Charles Simmons II, inquired of Simmons about the status of the Charter Auto Parks tenancy. Frolich was advised by Simmons that the lease between University of America Foundation and Charter Auto Parks had a 30-day cancellation clause in the event the property was sold to others. Frolich so advised the Trustee's counsel. Inasmuch as neither the Trustee nor Frolich had seen a copy of the Charter Auto Parks lease and were depending upon the information furnished by Simmons, a condition was placed in paragraph 1 on page 2 of the Escrow Instructions that seller believed that the only lease on the Hope Street property contained a 30-day cancellation clause but the escrow was expressly conditioned upon the existence of such a cancellation clause [Cl.Tr. 35]. [Appendix 1 hereto].

Subsequent to the execution of the Escrow Instructions of February 10, 1967, attorney Frolich provided the Reorganization Trustee with a copy of the parking lot lease which had been executed January 20, 1966 by Charles Simmons II, as president of University of America Foundation. It provided for a three-year term without any provision for cancellation [Cl.Tr. 125]. Upon learning that the lease did not contain a cancellation clause, the Reorganization Trustee made demand upon Charter Auto Parks to surrender possession on the ground that the University of America Foundation had no authority to execute the lease during the pendency of the fraudulent conveyance litigation. That demand was refused, but in a

further effort to obtain possession and permit completion of the sale escrow, the Trustee filed an Application on February 13, 1967 for an Order compelling the Charter Auto Parks to surrender the premises [Cl.Tr. 102]. Charter opposed the Trustee's Application, denied that the Reorganization Court had jurisdiction to determine the validity of the lease and sought $20,000 damages against the Reorganization Trustee [Cl.Tr. 128]. When the attempt of the Trustee's counsel to work out a settlement of the tenant's claim to possession failed, counsel immediately advised Appellants' attorney of the results of the meeting in the letter dated and mailed March 23, 1967 [Cl.Tr. 109]. [Appendix 2 hereto].

The letter of March 23, 1967 is an important document in these proceedings. By that letter, Frolich was advised that the Trustee would be unable to deliver possession of the parking lot within a reasonable period of time and that, accordingly, the Trustee would be required to refund the deposit of $27,500 previously made by the buyers on account of the purchase price. The letter stated: "Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966." No reply was received to the letter of March 23, 1967 by the deadline of March 30, 1967, but in a letter dated April 13, 1967 (received April 14, 1967), Frolich advised that he would <u>recommend</u> that his clients

close the escrow and take title provided the Reorganization Trustee proceeded diligently with an action against Charter Auto Parks to obtain possession of the parking lot [Cl.Tr.116]. [Appendix 3 hereto]. Appellants never unconditionally accepted the property subject to the Charter lease.

The Trustee's counsel deemed the duty to continue litigation against Charter Auto Parks burdensome to the estate and recommended to the Trustee that the sale with Appellants be terminated in accordance with paragraphs 1, 3 and 4 of the Escrow Instructions of February 10, 1967 [Cl.Tr. 113, 114]. [Appendix 1 hereto].

Under the provisions of paragraph 3 of the Escrow Instructions, if the buyers were ready to close the escrow, but the seller was unable to close the escrow, then the further accumulation of interest charges on the Scottish Rite Foundation deed of trust and the accumulation of taxes would have to be borne by the seller rather than the buyer. Because that potential burden could eliminate the small equity of the estate over encumbrances, it was expressly provided in paragraph 3 that:

> "Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer. In that event, there shall be no liability on the part of the seller except to pay escrow and title

expenses incurred and the seller will be required to return to the buyer the sum of $27,500 previously deposited ..."

The Trustee having concluded that the obligations for continuing the litigation and for interest and taxes were too burdensome, instructed his counsel to obtain authority from the Reorganization Court to return to Appellants the deposits theretofore made (of the $27,500 good faith deposit, $7,500 had been deposited with the Trustee and the balance of $20,000 had been deposited with the escrow at the Hollywood National Bank). Accordingly, on April 25, 1967, counsel prepared the Application for Order authorizing termination of the pending sale escrow and reimbursement of the sale deposit (filed April 26, 1967) [Cl.Tr. 27]. On April 26, 1967, the Reorganization Court entered its ex parte Order which authorized the Trustee to terminate the pending sale escrow and directed the Special Master to hear and consider, on May 1, 1967, the offer of Morris Greenstein of $290,000 subject to the Charter Auto Parks lease, and any other offers which might be made. [Cl.Tr. 23]. No prior notice of the Trustee's Application for the Order of April 26, 1967 was given to attorney Frolich, but on the same day that the Order was entered, Trustee's counsel advised Frolich of the Application and furnished a copy to him [Cl.Tr. 118]. On April 26, 1967, the Reorganization Trustee's counsel advised the Trustee to immediately return to Appellants the $7,500 deposit previously

made [Cl.Tr. 119] and advised the Hollywood National Bank that the seller was abandoning the escrow, that the escrow was terminated, that the funds on deposit should be returned to Appellants without charge, deduction or offset and that all escrow charges were to be billed to the Reorganization Trustee for payment by the estate [Cl.Tr. 120]. Copies of all of the foregoing letters were mailed to Appellants' attorney on the dates the letters bear. Payment of the escrow charges by the Reorganization Trustee was exactly in accordance with paragraph 4 of the Escrow Instructions of February 10, 1967 [Cl.Tr. 114] which provided:

> "In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, then seller's sole responsibility to buyer shall be the return of buyers' deposit of $27,500 without offsets or costs and seller agrees to pay all escrow and title charges incurred."

On the next day, April 27, 1967, Trustee's counsel forwarded a copy of the Order of April 26, 1967 terminating the sale escrow to the escrow officer and to Appellants' attorney [Cl.Tr. 122, 123].

At the hearing of May 1, 1967, held pursuant to the notice attached as Exhibit "A" to the Court Order of April 26, 1967 [Cl.Tr. 26], the property was reoffered for sale.

Attorney Frolich appeared on behalf of these Appellants as well as Charles Simmons, Charles Simmons II and University of America Foundation and engaged in a long colloquy with the Referee in Bankruptcy indicating Appellants' intention to cloud title to the property and prevent a resale [Rep.Tr., pp. 9-18]. After the colloquy ended, the Reorganization Trustee's counsel announced that the property was offered subject to the rights of Charter Auto Parks. After spirited bidding between Morris Greenstein and Joe's Auto Parks, the final and high bid of $309,000 was made by Joe's Auto Parks. Appellants did not make any bid. The sale of May 1, 1967 was approved and confirmed by the Court's Order of May 4, 1967 [Cl.Tr. 42]. No personal property was included in the sale to Joe's Auto Parks.

Based upon payment of a $2\frac{1}{2}\%$ finder's fee, the gross proceeds to the estate from the Joe's Auto Parks sale was $301,275 as compared to gross sales proceeds from the Appellants of $270,000 ($5,000 of their purchase price was for personal property) and the burdens and unpredictable outcome of the litigation with Charter were eliminated.

On May 5, 1967, without notice to the Trustee, Appellants filed their Application for an Order vacating the Court's Order of April 26, 1967 and for an Order reinstating the prior sale Order of February 14, 1967 [Cl.Tr. 50]. The Reorganization Court issued an Order to Show Cause setting Appellants' Application for hearing on May 15, 1967 [Cl.Tr.

18]. On May 8, 1967, by Ex Parte Order, the Reorganization Court vacated its own Order of May 4, 1967 which had approved and confirmed the sale to Joe's Auto Parks [Cl.Tr. 83]. After a lengthy hearing before the Reorganization Court, the Order of May 22, 1967 was entered denying the Application of Appellants to reinstate their sale but instead reinstating with full force and effect, the Court's prior Order of April 26, 1967 which had authorized the termination of the sale to Appellants [Cl.Tr. 146].

Appellants filed a Motion for Rehearing on June 8, 1967 [Cl.Tr. 158] which was heard at length by the Reorganization Court on June 19, 1967 despite the fact that the Motion for Rehearing was filed 17 days after the entry of the Order of May 22, 1967 and, therefore, was not timely filed under Rule 59b of the Federal Rules of Civil Procedure. On June 21, 1967, the Court entered its Order denying the Motion [Cl.Tr. 182]. On August 3, 1967, the Reorganization Court entered its Order reinstating and approving the sale to Joe's Auto Parks [Cl.Tr. 190]. Joe's Auto Parks has deposited with the Reorganization Trustee $50,000 as a good faith deposit on account of its purchase price and the sale escrow is ready to close except for the cloud on title caused by these three pending appeals. Ullman and Simon refused to accept return of the money deposited by them with the escrow and with the Trustee.

The Escrow Instructions and the exchange of the letters

of March 23, 1967 and April 13, 1967 were accurately analyzed by the Reorganization Court at the hearing of May 15, 1967 on the Appellants' Application to reinstate the prior sale Order in this colloquy with Appellants' counsel [Rep.Tr. p. 32-35]: THE COURT:

"This contract has a rather peculiar sentence in it that you have overlooked entirely, it seems to me.

It says:

'Seller shall have the right of abandoning this escrow. He can determine that he cannot deliver possession of the parking lot within a reasonable period of time to the buyer.'

Now, that is the only thing he had to do - if he determined that he could not deliver within a reasonable period of time then he could abandon the contract.

He did determine that. He wrote you a letter on March 23d and he says:

'It appears unlikely that the possession of the parking lot can be delivered within a reasonable period of time.

'Accordingly it now appears that the Trustee will be required to refund the deposit of $27,500.'

The Trustee went one step further. He said:

'If you are willing to take the property "as is", subject to the lease, we will go through with the deal. Please advise me on or before 5 o'clock P.M. March 30, 1967.'

Here was an offer to go ahead with the escrow under these modifications. It was not accepted within the time set. I don't think that you have any cause of complaint here except the fact you did not reply to this letter.

So that it seems to me that regardless of the question of whether you were entitled to notice from the Bankruptcy Court the Trustee here had a right to abandon the escrow if he determined he could not deliver possession within a reasonable period of time. He determined that; he notified you; he abandoned the escrow.

Now, what more?

MR. FROLICH: Your Honor, if you will look at my answer to that - it says:

'We will take it now and litigate the issue of possession.'

THE COURT: You didn't say that at all.

MR. FROLICH: Yes, I did, your Honor.

THE COURT: He asked you for a 'yes' or

'no' answer. And what did you do? You started out and apologized and said:

'I have not been able to answer because I have been engaged in a long lawsuit.'

That's no legitimate excuse, is it?

MR. FROLICH: Your Honor, if you will look at the first part of his letter - he goes into reasons why he feels that he can't do it.

I have answered those reasons in my letter, and I end up by saying:

'We will take the title; we will close the escrow now.'

THE COURT: No, no, you don't say that. You say:

'It is our desire to complete the sale as set forth above.'

MR. FROLICH: And what do I say?

THE COURT: You say:

'It appears to me that arrangements can be made to clean up. Upon the escrow closing and title delivered to Ullman and Simon that you proceed with your action to obtain possession of the parking lot in a diligent manner and I will do everything in my power to assist you in such litigation.'

You are trying to throw upon the Trustee the litigation of the parking lot. It seems to me

he lived up absolutely to the requirements of your escrow agreement.

And you didn't have any vested interest in this property - you don't have any vested interest in this property."

III

ARGUMENT OF THE CASE

By reason of the three Notices of Appeal, the Court now has before it the following three Orders:

1. The Order of the Reorganization Court filed April 26, 1967 authorizing the Reorganization Trustee to terminate a pending sale escrow and modifying a prior Order of the Reorganization Court of February 14, 1967 [Cl.Tr. 23].

2. The Order of the Reorganization Court filed May 5, 1967 denying the Application to reinstate the sale to Appellants [Cl.Tr. 146].

3. The Order of the Reorganization Court filed August 3, 1967 reinstating and confirming and approving the sale of May 1, 1967 to Joe's Auto Parks [Cl.Tr. 190].

Appellants have not set forth in their Brief a specification of errors as required by Rule 18 (2) (d). Nevertheless, Appellee will attempt here to respond to the contentions set forth under Paragraph II, sub-paragraphs A and B, of Appellants' Opening Brief and as set forth in Paragraph II, B 10 of the Addendum to Appellants' Opening Brief.

1.

Appellants contend that the Order of April 26, 1967 is void by reason of the Trustee's failure to give Appellants prior notice of the filing of the Application.

A. Even if it be conceded, arguendo, that Appellants were entitled, as a matter of right, to notice and to a

hearing on the Trustee's Application for authority to terminate the pending escrow and return to the buyers their deposit that error has been cured by the subsequent actions of the Reorganization Court. On May 5, 1967, without notice to the Reorganization Trustee, these Appellants filed an Application with the Reorganization Court for an Order vacating the Court's Order of April 26, 1967 and for an Order reinstating the prior sale Order of February 10, 1967. On May 5, 1967, an Order to Show Cause was issued ex parte on Appellants' Application and on May 8, 1967, the Reorganization Court issued an Ex Parte Order vacating its Order of May 4, 1967 which had approved and confirmed the sale of May 1, 1967 to Joe's Auto Parks. After a lengthy hearing before the Reorganization Court on May 15, 1967 (see Reporter's Transcript of 43 pages), the Court denied the Motion of Appellants and reinstated the Order of April 26, 1967.

Appellants filed a tardy Motion for Rehearing on June 8, 1967 and although the Motion was not timely under Rule 59b of the Federal Rules of Civil Procedure, nevertheless the Reorganization Court conducted another full hearing and then denied the Motion.

In short, even if Appellants had a right to prior notice of the Trustee's Application filed April 26, 1967, they were granted two hearings on that Application and, pending the full hearings, the Court suspended or vacated its prior Orders of April 26, 1967 and May 4, 1967. Appellants cannot, in

good faith, claim any lack of due process in these proceedings.

B. Although the issue is moot because Appellants, in fact, were given a full hearing, nevertheless, the Trustee had no obligation or legal duty to seek permission from, or give notice to, Appellants of the Trustee's Application for authority to terminate and abandon the escrow and return the deposited funds. The Trustee could have advised the buyers and the escrow that the seller was terminating the escrow without obtaining an Order from the Reorganization Court, but, as a matter of caution, because the Trustee had received $7,500 as a deposit, Trustee's counsel recommended obtaining an administrative Order from the Court authorizing the return of the funds deposited with the Trustee and with the escrow.

Further, at the time of the Trustee's Application of April 26, 1967 and the Court's Order which is the subject of the first Notice of Appeal, the conditions for the close of the escrow had not been satisfied and Appellants had no right, title or interest in the property.

2.

Appellants contend that a sale by a Bankruptcy Court is a judicial sale, that public policy requires that judicial sales be final and that Federal Courts are required to follow State decisions on matters of general law. Appellee has no argument with any of those general propositions of law. None of the cases cited by Appellants concerning finality of judicial sales is relevant here because none of those cases

concerned a sale which was, by its explicit terms, subject to conditions precedent and conditions subsequent which, having failed to occur, caused the sale to fail.

That sales in the Bankruptcy Court may be conditional has been recognized by the textwriters and by the Courts. "It perhaps deserves re-emphasis that the order of confirmation may itself recognize that the sale is conditional on performance of certain obligations imposed on the purchaser or on other events identified in the order."

4A Collier on Bankruptcy, 14th. Ed., page 1175, fn. 66.

Appellants seek to ignore the express terms and conditions contained in the Escrow Instructions and have presented their case as though it involved merely the vacating or setting aside of an unconditional Order Confirming Sale, but "the rights and quantum of property acquired by the purchaser depend primarily upon the terms of the sale as ordered or agreed upon." [Emphasis added]

4A Collier on Bankruptcy, 14th. Ed., page 1198.

The instant case is similar in nature to that considered in Walker v. Harper, (CA 5 Cir. 1943), 133 F.2d 418, where the bankruptcy trustee agreed to sell a quantity of crude oil but at the time of the sale, the trustee did not have the tenders needed to move the oil from storage tanks and pipe lines. Under the sale terms, an effort was to be made to secure tenders, and as soon as they were secured by the

trustee, the buyer was to pay at a certain rate per barrel. Negotiations for tenders were not as successful as had first been anticipated, and several months passed with the oil in storage and deteriorating in value. Thereafter, the trustee negotiated with a new buyer for a sale of a portion of the oil at a higher price. The first purchaser filed a claim for loss of profits based on the difference between the original purchase price and the new sale price plus reimbursement of certain expenses.

The Court concluded that the sale was made on condition that tenders were to be obtained, and until tenders were secured, delivery of the oil could not be made to the first purchaser and he could not be made to pay for the oil. The Court held that title had not passed to the purchaser, that it had remained in the trustee and that the contention of the first purchaser that he was entitled to the proceeds of the second sale was without merit. See also Moss v. Mosser, (ED Ark.,1953), 115 F.Supp. 343.

This Court reviewed the power of the Court to set aside a confirmed sale even where the trustee failed to provide the explicit protection for the estate contained in the Escrow Instructions now before this Court when it decided Proctor & Gamble Mfg. Co. v. Metcalf, (9 Cir., 1949), 115 F. Supp. 207. At page 209, this Court stated the rule as follows:

"*** Where there are even slight circumstan-

ces which suggest that there is unfairness to the estate in bankruptcy, a careful consideration should be had on review and a confirmed sale should be set aside if necessary to rectify the situation. While, if Referee and District Judge agree, an appellate court will rarely interfere, the District Judge has the responsibility to see that a sale which leaves the estate unprotected should not be confirmed.

"There is a general policy which emphasizes the stability of judicial sales as of great importance in smooth and correct judicial administration. Balancing that, it is of overwhelming importance that the rights of creditors in a concern in bankruptcy should be protected and that a disposal of property on terms which violate the rule should not be permitted to stand."

3.

Appellants argue that they became the equitable owners of the real property by reason of the Court's Order authorizing the sale and the entry into the Escrow Instructions of February 10, 1967. Even if that were to be conceded, arguendo, it would seem to have no relevancy to these proceedings, except perhaps with respect to the standing of Appellants to

receive notice of the Trustee's Application for authority to terminate the escrow. Inasmuch as Appellants were granted full relief from that Ex Parte Order, its entry, without notice to them, is irrelevant.

Nevertheless, it should be noted that the California Supreme Court stated, in Los Angeles High School District v. Quinn, (1925) 195 Cal. 377, 383, "Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. (Dyson v. Bradshaw, 23 Cal. 528, 536.) If he does not comply with the conditions when required, or refuses to comply, the escrow-holder cannot make a valid delivery of the deed to him. (McLaughlin v. Clausen, 85 Cal. 322, 327 [24 Pac. 636].)"

4.

Appellants contend that because the Order of February 14, 1967 had become final, the Court was powerless to subsequently modify it, vacate it or set it aside. This is a complete misconstruction of the Order and of the status of the parties. There was no desire on the part of the Trustee to appeal from the Order entered February 14, 1967; that Order was free of error when entered, but by reason of the subsequent failure of the express conditions, further Orders

were sought by the Trustee in order to avoid any apparent clouds on title and in order to keep the record clear with respect to the return of Appellants' deposit and in order to consummate the second sale.

The power of the Court to modify and vacate its sale Orders is unquestioned. See, for example, In Re Pure Penn Petroleum Co., (2 Cir., 1951), 188 F.2d 851.

5.

Appellants contend that the Trustee waived the power to cancel Appellants' escrow, but no evidence was introduced to support such a contention.

Appellants did not present in their pleadings or in any evidence introduced before the Court below, issues with respect to waiver or estoppel. See the Application of Ullman and Simon for Order to Show Cause filed May 5, 1967 (Cl.Tr. 50]. In fact, Appellants did not introduce, purport to introduce or attempt to introduce any witnesses or other evidence of any kind in the course of the hearing of May 15, 1967 on their own Application and Order to Show Cause of May 5, 1967. It is elementary that a question which was neither pleaded nor presented to the Trial Court cannot be considered for the first time on appeal. Stephens v. Arrow Lumber Co., (CA 9 Cir. 1966), 354 F.2d 732.

A similar claim of estoppel and waiver made against the Trustee in Moss v. Mosser, (ED Ark. 1953), 115 F.Supp. 348, 349 was rejected, the Court stating that waiver involves both

knowledge and intention, and estoppel requires that an innocent party be induced by the fault of the other party to change his position for the worse in such manner that it would operate as a virtual fraud to allow the party to whom he has been misled to assert the right in the controversy.

It is the recognized rule in California that "... the vendors right to declare a forfeiture is not waived by merely delay in declaring it, by forebearance, by willingness to accept overdue payments ... Nor is it waived ... by failing to make a protest against acts of the purchaser now required by the contract ... and it has been held that an unaccepted proposal by the purchaser of certain terms and conditions on which default would be waived does not operate as a waiver by the vendor." 50 Cal. Jur.2d, Vendor and Purchaser §245, p. 308,309. See, for example, Champion Gold Mining Co. v. Champion Mines (1912), 164 Cal. 205, 128 P. 315; Kelso v. Ulrich (1945), 67 C.A.2d 698, 155 P.2d 407.

6.

In the Addendum, Appellants contend that the three Orders concerning the sale were void for failure to comply with Bankruptcy Act §§206 and 208.

No such contention was made in the Court below and, accordingly, it cannot now be presented for the first time on appeal.

§206 makes no reference to the right of the parties there named to notice, but is concerned only with the right

of such parties to be heard. Bankruptcy Act §116 (3) (11 U.S.C. §516) makes specific provision with respect to the notice to be given for the sale of property:

> "Upon the approval of a petition, the judge may... (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve;".

With respect to each of the Orders entered, the Court did, in fact, follow exactly the provisions of §116 and the Court, by appropriate Order, prescribed the form of notice and the persons to whom notice should be sent. It is unquestioned that the authority provided by §116 includes the power of the Reorganization Court to authorize a sale without any notice. See, for example, 11 Remington on Bankruptcy, §4509 at page 223 where it is stated:

> "The notice requirement under §116 (3) is 'upon such notice as the judge may prescribe'. This permits an immediate sale or lease without any notice, though this should be done only in unusual cases."

A thorough analysis of the applicability of §206 is contained in 6A Collier on Bankruptcy, 14th. Ed., Paragraph 9.23, at page 307 through 309, where it is stated that §206

does not of itself grant a right to notice of all steps taken in the reorganization; that a contrary construction would result in much unwarranted difficulty and expense; that the requirements for notice in Chapter X have been constructed along more flexible lines; and that the specific provisions in Chapter X state when notice shall be given and the persons to whom notice shall be given.

As Collier has observed: "Thus those matters deemed by Congress to be of paramount importance specifically require notice to the parties included within §206; in other situations, the question of notice rests in the discretion of the Judge, to be exercised either as to whom notice shall be given and the form thereof if notice is required by the statute without further specification, or as to whether notice shall be given at all and to whom, etc., in cases where Chapter X is silent." [Emphasis added]. At page 308.

Apparently, Appellants contend that as buyers they can complain of an alleged failure to give notice to the Securities and Exchange Commission. The Securities and Exchange Commission's senior attorney assigned to this case was apprised of all of the Trustee's actions in connection with the sale of the Hope Street property, specifically including the sale Order entered February 14, 1967 and the subsequent Orders, and Trustee's counsel was in constant communication by telephone and correspondence with counsel for the Securities and Exchange Commission. The Securities and

Exchange Commission has not objected in any manner whatsoever to the Orders now on appeal and these Appellants have no standing to complain on behalf of the Securities and Exchange Commission.

7.

Appellants have contended that they are entitled to specific performance because they were involved in a contract concerning real property, apparently in the belief that this is the only element of proof necessary to obtain that extraordinary equitable relief. It is, however, elementary that specific performance is not a matter of obsolute right but rests within the sound discretion of the Court and is to be granted only in accordance with established principles of equity with reference to facts of the particular case.

Pasqualetti v. Galbraith, (1962), 200 C.A.2d 378, 382.

The contract in question, which consists of the escrow instructions of February 10, 1967 and the Court Orders entered in connection with the sale, cannot provide the basis for Appellants' claim of specific performance because of lack of mutuality and the failure of the consideration and the circumstances of the contract to satisfy the conscience of the Court.

California Civil Code §3386

Moore v. Tuohy (1904), 142 Cal. 342, 75 Pac. 896

Paratore v. Perry (1966), 239 C.A.2d 384, 387

SUMMARY AND CONCLUSION

The United States District Judge, acting as the Reorganization Court, gave two full hearings to Appellants and thereafter entered the Order of May 22, 1967 denying the Application of Appellants, dismissing the Order to Show Cause and adjudging and decreeing that the Appellants had no right, title or interest, lien, charge or encumbrance in the Hope Street real property. No evidence was introduced in the course of the two hearings or in the course of any other hearing in support of any of Appellants' contentions. The conditions of the escrow were not satisfied by Appellants; they made no offer to accept the property subject to the parking lot lease until the hearing of May 1, 1967 when Appellants learned that other parties were interested in the property and would pay $309,000.00 for it. Only when Appellants realized that they had a potential profit of more than $39,000 on a resale of the property, did they show a sudden and new interest in complying with the terms of the sale, but they displayed no such interest prior to the formal notice by the Trustee to the escrow company and to the buyers that the escrow was being terminated.

The agreement between the Reorganization Trustee and these Appellants contemplated the possibility of the very problems that arose here and provided explicitly for the results which should flow upon the occurrence of the events. Appellants having failed to convince the trial Court that it

should rewrite the contract for their benefit, now ask that the Appellate Court ignore the express provisions which are not to Appellants' liking and substitute therefor new terms, conditions and covenants.

In view of the failure of the Appellants to introduce any evidence at any stage in the proceedings and their reliance upon issues so patently sham as the alleged lack of due process, this appeal should be deemed by the Court to be frivolous and sanctions accordingly imposed upon Appellants as provided by the rules of Court. Appellee prays that the Court enter its Order affirming and approving the Orders of the United States District Court which are the subject of the three appeals.

Respectfully submitted,

GENDEL, RASKOFF, SHAPIRO &

QUITTNER

By: Arnold M. Quittner

Arnold M. Quittner
Attorneys for Appellee, Kyle Z. Grainger, Jr.

APPENDIX 1

Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

1) Prior to close of escrow seller will deliver into escrow all leases in respect of subject property for delivery to buyer at close of escrow, with executed assignments in buyer's favor. As a matter of record only with which escrow holder is not to be concerned, the following is entered herein at the request of the parties: "Seller believes that the only lease on the subject property in effect at the present time is a lease between seller's predecessor in title and the Parking Lot Operator, and that said lease contains a cancellation provision providing that any new purchaser of said property may cancel said lease upon 30 days written notice. The offer to purchase subject property is conditioned upon a 30 day cancellation clause in said Parking Operator's Lease."

2) Buyer has heretofore paid to seller, outside of this escrow the sum of $27,500.00. In the event buyer fails to deposit the balance of the funds within 30 days from date hereof, and provided seller has performed everything required of him in order to close this escrow, then in that event, this escrow may be extended for an additional 90 days at the sole option of the buyer by written notice to escrow holder and to seller, but upon buyer so extending this escrow, seller shall be entitled to apply to interest on the note secured by first trust deed of record, and taxes accruing during the escrow period such portion of the $7,500.00 deposit retained by seller outside of escrow, as may be required on a pro-rata basis up to the actual date of closing this escrow. The maximum liability of buyer for said proration of the aforesaid interest on the first trust deed and taxes shall not exceed $2,000.00 per month. In the event

that this escrow fails to close within the additional 90 day period due to any default on the part of the buyer, then in that event this escrow shall be deemed terminated and all documents deposited by seller shall be returned to seller. The following is entered herein at the request of the buyer and seller as a matter of record only with which escrow holder is not to be concerned: "In the event of such aforementioned termination seller shall retain the balance of said $27,500.00 deposit as liquidated damages and neither buyer nor seller shall thereafter have any claims, demands or causes of action, one against the other, nor shall buyer have any right, title or interest, lien, charge or encumbrance in or to or against said real property. The purchase of the personal property is conditioned upon the buyer completing the purchase of the real property and likewise, the purchase of the real property is conditioned upon the buyer completing the purchase of the personal property. With respect to the right of seller to apply to interest and taxes a portion of the $27,500.00 deposit as provided herein, to the extent of such application, the seller must be reimbursed prior to close of escrow so that at close of escrow the seller will have not less than $27,500.00 on hand. As an example, in the event that the escrow is extended beyond the initial 30 days and into the additional 90 day period, and if, during said 90 day period, the seller is entitled to apply to interest and taxes the total sum of $5,000.00 from the deposit so that the deposit is reduced to $22,500.00, then buyer must, prior to close of escrow, pay to seller an additional $5,000.00 to bring the deposit back up to the original $27,500.00 level."

3) In the event that buyer is ready to close this escrow within the initial period of 30 days or in any extended period as set forth in paragraph 2 above, and seller is not able to deliver possession of the parking lot premises to buyer at the time when escrow is ready to be closed by buyer by the deposit of the balance of the funds due from him, then it is agreed that seller and not buyer will be charged with the pro-ration of interest on the first trust deed and taxes from that period of time when the escrow could have been closed by the buyer until the time when the escrow actually closes. Seller shall have the right to abandon this escrow if he determines that he cannot deliver possession of the parking lot within a reasonable period of time to buyer.

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Superseding previous instructions which are hereby cancelled, null and void.

HOLLYWOOD NATIONAL BANK

ESCROW DEPARTMENT
ESCROW INSTRUCTIONS

Escrow No. 363-GB February 10, 1967

To Hollywood National Bank

These instructions are executed simultaneously with the original escrow instructions of even date, and are made a part thereof.

3) Continued from page 2
In that event there shall be no liability on the part of the seller except to pay escrow and title expenses incurred, and the seller will be required to return to the buyer the sum of $27,500.00 previously deposited with Kyle Z. Grainger, Jr., the Trustee herein, of which the sum of $7,500.00 has been retained by said Kyle Z. Grainger, Jr., and the balance of $20,000.00 has been deposited into this escrow."

4) In the event that this escrow fails to close due to any default or inability of the seller to deliver a good and marketable title or any other default on the part of the seller, then seller's sole responsibility to buyer shall be the return of buyer's deposit of $27,500.00 without offsets or costs, and seller agrees to pay all escrow and title charges incurred.

APPENDIX 2

March 23, 1967

2340/7

John N. Frolich, Esq.
727 West Seventh Street
Los Angeles, California

Re: Human Relations Research Foundation
(University of America Foundation)

Dear Mr. Frolich:

As you know, I met with the attorneys for Charter Auto Parks this morning to discuss the relinquishment of possession of the 929 South Hope Street parking lot. Irving Sulmeyer could not attend the meeting, and Robert Alberts, of his office, sat in on the meeting together with Wolk and Karno. Their position was apparently adamant with respect to voluntarily relinquishing possession. They insisted, among other things, that the Reorganization Estate was in no position to complain about the lease of January, 1966 with University of America because the Trustee had joined in obtaining an Order for application of the rental proceeds to the Scottish Rite Foundation and that this act amounted to an acceptance of the lease. It appears to me at this moment that there will be no voluntary surrender of the premises and that Charter is going to rely upon the lease of January 20, 1966 which was executed by Charles Simmons II as President of University of America Foundation and against which Simmons received $2,200 as payment for the 35th and 36th months of the term. Unfortunately, there was no provision in the lease for cancellation upon sale of the property. Under the existing circumstances and in view of the apparent intent of Charter Auto Parks to litigate the matter, the Trustee now advises you on behalf of the buyers (George Ullman and Joe Simon) that it appears unlikely that possession of the parking lot can be delivered within a reasonable period of time and, accordingly, it now appears that the Trustee will be required to refund the deposit of $27,500. Please advise me on or before 5:00 p.m., March 30, 1967, whether the buyers will accept the property subject to whatever rights have been created in Charter Auto Parks or their successors by reason of the lease of January 20, 1966.

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It is particularly unfortunate that the reorganization estate has been placed in this position in view of my letter of December 18, 1964 to Charles Simmons II, a copy of which is enclosed herewith.

Very truly yours,

AMQ:pj
Enclosure

ARNOLD M. QUITTNER

cc: Honorable James E. Moriarty (w/encl.)
Kyle Z. Grainger, Jr., Esq. (w/encl.)

APPENDIX 3

Law Offices

John N. Frolich
Irving W. Kregal
James L. Lund

Cable Address:"Beajohn"

JOHN N. FROLICH
727 West Seventh Street
Los Angeles, California 90017
MADISON 2-8104

April 13, 1967

Mr. Arnold M. Quittner
Gendel, Raskoff, Shapiro & Quittner
Attorneys at Law
6380 Wilshire Blvd. -16th Floor
Los Angeles, California 90048

Re: Human Relations Research Foundation
(University of America Foundation)

Dear Mr. Quittner:

Please excuse my not answering your letter of March 23, 1967 sooner, but as you know I have been engaged in a long trial in the Superior Court which I just completed yesterday and I have been unable to take care of this matter.

With reference to the position of Sulmeyer's office regarding the lease between University of America Foundation and Sulmeyer's clients, Wolk and Karno, it occurs to me and I have told Mr. Alberts that in my opinion the fact that the trustee joined in obtaining an order for application of the rental proceeds to the Scottish Rite Foundation, in no way precludes the trustee from contesting the validity of said lease.

As you will recall in the first place, if I remember my facts correctly the Second Trust Deed holder on the premises at 929 South Hope, had served a Notice of Sequestration of Rents on Charter Auto Parks, pursuant to their rights under their Second Deed of Trust. Charter Auto Parks was then legally liable to pay said sums directly to the Second Trust Deed holder. It was the Second Trust Deed holder who voluntarily gave up these funds to the First Trust Deed holder in order to preserve whatever interest and equity that the Second Trust Deed holder had in the property. As I understand it now and as I understand it at the time of that negotiated arrangement the bankrupt estate had never received any rents on said lease of Charter Auto Parks. Since I was instrumental in getting the Second Trust Deed holder to

funnel these funds directly to the FirstTrust Deed holder (Scottish Rite Foundation), I fail to see how using money belonging to the Second Trust Deed Holder for his own benefit and to preserve his interest and equity in the property amounts to an acceptance of this lease by the trustee.

Further since you had put Charter Auto Parts on notice prior to the time that they executed the lease with University of America Foundation, it occurs to me that they would have no rights whatsoever in the matter.

Under the circumstances, it occurs to me that arrangements can be made between us that (1) the escrow closes and title be delivered to Ullman and Simon, and (2) that you proceed with your action to obtain possession of the parking lot in a diligent manner and I will do everything in my power to assist in said litigation.

I have advised my clients of the probability that even if there is a verdict in favor of the reorganization trustee in the bankruptcy court, there is always the possibility of a review and appeal. I pointed out to my clients, Ullman and Simon, that this may delay their obtaining actual possession of the property for some period of time. However, I recommended to them that they complete their sale of the subject property at 929 South Hope Street and close the escrow as soon as you are prepared to deliver title to them upon the agreement of the reorganization trustee that he will proceed diligently as outlined above.

Under the circumstances you are advised that it is our desire to complete the sale as set forth above.

Very truly yours,

JNF:ac JOHN N. FROLICH
cc: Honorable James E. Moriarty
Mr. Kyle Z. Grainger, Jr.
Mr. George Ullman

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Arnold M. Quittner, Esq.

No. 22153
22153-A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN & JOE SIMON,
INTERESTED PARTIES,

Appellants,

vs.

KYLE Z. GRAINGER, JR., et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA.

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE ULLMAN, et al.,

Appellants,

vs.

KYLE Z. GRAINGER, JR.,

Appellee.

No. 22153
No. 22153A

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

An Ex Parte Order vacating a confirmed judicial sale must be reversed because the purchaser at a judicial sale must unquestionably be notified of the proceedings to set aside the confirmation, and inasmuch as no man may be divested of his rights of property without due process of law, notice to the purchaser is a jurisdictional prerequisite (Halliday v. Stuart, 151 U.S.229, 38 L. ed. 141, 14 S. Ct. 302). Moreover, failure to give notice to a purchaser has been held to be fatal even though the purchaser was the Clerk of the Court out of which the process for sale was issued and the Motion to Vacate it was filed (Ann. Cas. 1914 D758).

Appellants also contend that an Ex Parte Order vacating a confirmed judicial sale in bankruptcy must also be reversed on equitable principles since the Bankruptcy Court is vested with equity powers (B.A. Section 2(a).)

Appellants' recognize the right of a Bankruptcy Court to set aside a sale either before or after confirmation if it appears that the sale was entered into through mistake, inadvertance, or improvidence (Allen v. Union Transfer Co., 152 F2d 633). Appellants' contend, however, that the maxim "He who seeks equity must do equity" also applies in Courts of Bankruptcy and for that reason the "Order Modifying Order of February 10, 1967, filed April 26, 1967,"must be reversed.

Although cases hold that Federal Rules of Civil Procedure 60 (b), wherein a party may be relieved from a final order "upon such terms as are just . . . , " is not applicable in bankruptcy because no order in bankruptcy is final until the whole proceeding has terminated, the equitable principles which Federal Rules of Civil Procedure 60(b) incorporates is applicable to bankruptcy(In the Matter of California Lumber Corporation, Bankrupt, 227 F. Supp. 63, 68).

Federal Rule of Civil Procedure Section 60(b) is based upon California Code of Civil Procedure Section 473 and this Federal Rule should be given the same construction as the California rule (U.S. v. Mutual Const. Corp., 3 F.R.D. 227; Fiske v. Buder, 125 F2d 841). Under California Code of Civil Procedure Section 473, California cases have uniformly held "that the trial court is without power to set aside an order involving judicial action and regularly made, and enter another and different order without notice to the adverse party." (Emphasis the Court's in Harth v. Ten Eyck,

16 C2d 829 at 834).

The Federal Rules of Civil Procedure are made applicable to bankruptcy by General Order in Bankruptcy No. 27. The purchaser of property in a bankruptcy proceeding is a party to that action (In re Strumbs Lane, 64 F. Supp. 731). When the trial court issued its Ex Parte Order Modifying the Order of February 10, 1967, without notice to Appellants herein, who were purchasers of the subject property in the bankruptcy proceeding and therefore parties to that action, the equity principles embodied in Federal Rule of Civil Procedure 60(b) and defined by California Code of Civil Procedure Section 473, were violated. Moreover, the above-mentioned Ex Parte Order violated the spirit of General Order in Bankruptcy No. 23 which requires notice to parties in interest of orders by referees not involving ministerial or administrative directions (Armstrong v. Fisher, 224 F97; Title & Trust Co. v. Wernick, 68 F2d 811; In re Cook, 28 F2d 521). Additionally, Ex Parte Orders vacating judicial sales frustrate the public policy designed to promote confidence in the integrity and stability of judicial sales.

Appellants contend that the Ex Parte Order, which is the subject of this Appeal, must be reversed because Appellants' fundamental rights of due process have been violated and because the equitable policies embodied in the

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equity powers of the Bankruptcy Court also have been violated.

Respectfully submitted,

JOHN N. FROLICH
Attorney for Appellants

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

GERALDINE HICKEY, being duly sworn, says: That affiant is a citizen of the United States and a resident of the County aforesaid, that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 727 West 7th St., Los Angeles, Calif. 90017; that on April 10, 1968, affiant served the within APPELLANTS' SUPPLEMENTAL REPLY BRIEF on the following named parties by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, City of Los Angeles, State of California, addressed to said parties at the addresses as follows:

GOLDMAN & GOLDMAN
408 South Spring Street
Los Angeles, California

GENDEL, RASKOFF, SHAPIRO & QUITTNER
6380 Wilshire Boulevard
Los Angeles, California 90048

C. J. ODENWELLER, ESQ.
Securities & Exchange Commission
450 Golden Gate Avenue
San Francisco, California

Geraldine Hickey
GERALDINE HICKEY

Subscribed and sworn to before me this 10th day of April, 1968.

JOHN N. FROLICH
Notary Public in and for said County and State

JOHN N. FROLICH
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Ex[illegible] 19[illegible]